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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DARIUS LAKE, Defendant and Appellant.	D074304 (Super. Ct. No. SCD274161)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed with direction.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winter, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Darius Lake raises claims about jury selection and prosecutorial error during closing argument. We reject both claims as we explain below.

We remand the case for the court to consider its discretion in imposing enhancements for the prior serious felony, pursuant to a new law that became effective during the pendency of this appeal.

BACKGROUND

Procedural Background

A jury convicted defendant of 10 robberies and one attempted robbery that he committed at five banks. (Pen. Code,[1] §§ 211, 664/211.) It could not reach a decision as to two other robberies at one bank. Those charges were later dismissed. Defendant waived his right to a jury trial on his prior convictions. The trial court found true that he had three prior felony convictions for robbing banks. Those were serious felony convictions (§§ 667, subd. (a)(1), 668) and strike convictions (§§ 667, subds. (b)-(i), 668, 1170.1) under California law.

The court sentenced defendant on June 15, 2018, to a determinate term of 25 years, consisting of five consecutive terms of five years each for the prior serious felony conviction, and a consecutive indeterminate term of 125 years to life, consisting of five consecutive third-strike terms of 25 years to life. Defendant filed a timely notice of appeal.

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1 Further statutory references are to the Penal Code.

Facts[2]

Count 1 - October 5, 2017,[3] Robbery at Bank of the West

On October 5, defendant approached bank teller Reema D. at the Bank of the West in El Cajon and demanded money. He threatened to kill her. Reema gave defendant the money in her first drawer. He demanded "100's," and she gave him about $5,000 from her second drawer. Defendant took the money, put it in a bag he was carrying, and ran out the door. Reema identified defendant at trial. She also identified him in a series of photographic stills from the surveillance video. Surveillance video of the robbery was played for the jury.

Counts 4 and 5 - October 12, Robberies at Pacific Western Bank

Defendant entered the Pacific Western Bank in San Diego on October 12. He first approached bank employee Christopher O. and demanded money, which Christopher turned over. Defendant demanded more—"100's"—but Christopher said he had no more. Defendant then went to employee Carlos F. and demanded "100's." Carlos F. gave defendant money from his drawer, which defendant put in his bag. The employees estimated that defendant took about $1,560 in all. Christopher O. and Carlos F. each identified defendant from his photograph before trial and identified him in court.

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2 Counts 2 and 3 charged robberies of two bank tellers at U.S. Bank on Navajo Road that occurred on October 10, 2017. The jury could not reach a decision on these charges.

3 All robberies occurred in 2017.

Surveillance video of the robbery and photographic stills from the video were shown to the jury.

Counts 6 through 9 - October 14, Robberies and Attempted Robbery at Navy Federal Credit Union

On October 14, defendant went into the Navy Federal Credit Union in San Marcos. He went first to Kristine E., a greeter, and demanded "100's" from her, threatening to kill people in the bank. Kristine told him there was no money at her station. He next went to Jennine S., a teller, and demanded "100's" from her. She gave him all the money in her drawer. He then went to Tiffany G., also a teller, screaming for her to give him her money. She complied, giving him about $2,900. Jason A. was at Tiffany's station, depositing $1,400 in cash. He heard defendant demanding "100's." Defendant took Jason's money, too. Two of the employees and the customer identified defendant at trial. Defendant showed his neck tattoo to the jury and to the witnesses, who identified the tattoo as the same one shown in the surveillance video of the robbery. Surveillance video and still photographs from the video of the robbery were shown to the jury.

Counts 10, 11 and 12 - October 19, Robberies at Mission Federal Credit Union

Defendant and another man went into the Mission Federal Credit Union on October 19. Defendant demanded money from teller Pamela G. while the other man demanded money from teller Babe Y. Babe handed over cash to the robber. Wolf K., a customer, was at Pamela's station. He had put $300 on the counter for deposit into his account. Defendant walked up, demanded his money, and took it. Pamela thought the

robbery was a joke at first and did not provide all her money. Defendant became hostile and aggressive, yelling at Pamela that he wanted her "100's." Defendant jumped on top of the counter, grabbed her cash drawer, and took the money from it. Pamela and Babe both identified defendant at trial as one of the robbers. Defendant's fingerprints were at Pamela's station. A surveillance video of the robbery was played for the jury. Photographic stills of defendant were also shown to the jury.

Count 13 - October 27, Robbery at Navy Federal Credit Union in Chula Vista

On October 27, defendant demanded "large bills" from employee Jessica A. at the Navy Federal Credit Union in Chula Vista. She gave him all the cash she had, about $2,500. Jessica identified defendant as the robber. The surveillance video and photographic stills from the video were shown to the jury.

Investigation

Defendant was identified by his fingerprints, confirmed by images of him from the surveillance videos. He was arrested two days after the last robbery. Officers searched defendant's phone pursuant to a search warrant and found photos and a video of defendant flashing large amounts of cash during the time when the string of robberies occurred. An FBI officer compiled and showed to the jury photographs of the robber from each bank along with known photographs of defendant. The officer explained that the FBI dubbed defendant "the chameleon bandit" because he kept changing clothes for each robbery.

Officers questioned defendant after he was advised of and waived his rights. A videotape of his interrogation was played for the jury. Defendant said he had been

released from federal custody in August 2017 after serving about five years for prior bank robberies. He initially denied having robbed the banks and said he was not the person in the surveillance videos. He eventually admitted having robbed the banks. The officer told defendant that he was called "the chameleon." Defendant laughed and said, "I love that shit. . . . I also wanted to be the clean getaway bandit . . . ." Defendant said he lost track of how much money he had taken, and that he had spent the money having fun. The officer asked defendant about each robbery and defendant said he remembered each one, including the robberies of the U.S. Bank on Navajo Road on which the jury could not reach a decision.

DISCUSSION

1. *Batson-Wheeler*[4] Claim

Defendant claims that the prosecutor acted with discriminatory intent when she used a peremptory challenge to strike the only Black venireperson, and that the trial court erred in denying his *Batson-Wheeler* motion. We reject this claim because defendant did not meet his burden of showing an inference of discriminatory intent.

A. *Proceedings Below*

The court conducted general voir dire of the entire panel of 45 prospective jurors. The attorneys had about an hour each to question the prospective jurors after the court finished asking general questions. Both attorneys used the bulk of their time to ask

4 *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*), overruled in part on other grounds in *Johnson v. California* (2005) 545 U.S. 162, 173 (*Johnson*).)

general questions of the panel as a whole, and minimal time asking questions specific to single prospective jurors. For example, defense counsel opened with general questions about the power of suggestion and the amount of information necessary to make a decision. The prosecutor asked the entire panel about following the law and direct and circumstantial evidence. Neither the prosecutor nor defense counsel questioned prospective juror number 12 (Juror 12).

The prosecutor exercised a peremptory challenge against Juror 12. Defendant's attorney objected, stating that Juror 12 was the only Black person among the 45 prospective jurors, and the defendant was also Black. Defendant's attorney said that Juror 12 had said nothing in voir dire that suggested he was biased against the district attorney, that he would be unwilling to listen to the testimony, or that he would be unwilling to consider what the victims said. He pointed out that the prosecutor asked no questions of Juror 12 during voir dire and her first three peremptory challenges were against people who appeared to be minorities.

The court said that Juror 12 appeared to be Black, a member of a cognizable group, but found no prima facie case of discrimination. It acknowledged that bias can be shown in striking only one juror, but cited case law that it is rare and difficult to show a prima facie case after the excusal of only one or two prospective jurors of a cognizable group, unless there is significant supporting evidence of purposeful discrimination. (Citing *People v. Bell* (2007) 40 Cal.4th 582, 597–598 (*Bell*), disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13; *People v. Hamilton* (2009) 45 Cal.4th 863, 899 (*Hamilton*) [pattern of discrimination is circumstantial

evidence from which one might draw inferences, but the challenge of the only Black person subject to challenge was not sufficient in and of itself to suggest a pattern]; *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1198 (*Wade*) [striking of only Black member of venire panel not sufficient to show prima facie case]; *People v. Christopher* (1991) 1 Cal.App.4th 666, 672.) The court found no evidence of discriminatory intent in the sole fact of striking of the single African-American subject to challenge.

Although it found no prima facie case, the court invited the prosecutor to state her reasons for challenging Juror 12. The prosecutor said she was concerned that Juror 12 appeared to not have much life experience. She said that a juror's life experience "would be important for a juror to have in this particular case when we are dealing with multitude of victims and a multitude of crimes and issues in a case that somebody with some life experience would be necessary to fairly evaluate the case." The prosecutor said that Juror 12 was very young and lived with his parents or grandmother. He had no children and no prior jury experience. Juror 12 mentioned that his grandmother worked at the juvenile court but he did not know what she did. This could have been in response to the court's question about the occupations of adults living with the juror, or the question about acquaintances in law enforcement. Juror 12 added that "sometimes we would discuss things like silly things the kids would do, like the cases and things like that." The prosecutor found this comment "concerning," because juvenile delinquency courts had crimes ranging from misdemeanors to murder, so "his flagrant comment about silly things kids do cause[d] some concern."

The prosecutor further explained that she had exercised a peremptory challenge against a man with a Hispanic surname because of his youth and lack of life experience. She had challenged a woman of apparently Asian descent because the prosecutor perceived her to be confused and lacking in experience. The court made no comment on the prosecutor's proffered reasons, and denied defendant's motion.

B. *Legal Guidelines*

Although a prosecutor may exercise a peremptory challenge to strike a prospective juror " 'for any reason, or no reason at all' " (*People v. Scott* (2015) 61 Cal.4th 363, 387 (*Scott*)), he or she may not use a peremptory challenge to " 'remove prospective jurors based on group bias, such as race or ethnicity.' " (*People v. Rhoades* (2019) 8 Cal.5th 393, 423 (*Rhoades*), quoting *Batson*, *supra*, 476 U.S. at p. 97; *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277.) "The *Batson*/*Wheeler* framework is designed to enforce the constitutional prohibition on exclusion of persons from jury service on account of their membership in a cognizable group. It is also designed to otherwise preserve the historical privilege of peremptory challenges free of judicial control, which 'traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.' " (*Scott*, at p. 387.) Therefore, " 'there "is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." ' " (*People v. Armstrong* (2019) 6 Cal.5th 735, 766 (*Armstrong*).)

When a defendant asserts that a peremptory challenge was based on group bias, the three-step procedure is well known. The defendant must first demonstrate a prima

facie case by showing an inference of discriminatory purpose. The burden then shifts to the prosecutor to explain the challenges by offering race-neutral justifications for the strikes. If a race-neutral explanation is tendered, the process moves to the third step, at which the trial court must assess the sincerity of the reasons given and determine if the moving party has proved purposeful racial discrimination. (*Rhoades*, *supra*, 8 Cal.5th at p. 423; *Johnson*, *supra*, 545 U.S. at p. 168; *People v. Smith* (2018) 4 Cal.5th 1134, 1147.) " 'The prosecutor's justification does not have to support a challenge for cause, and even a trivial reason, if genuine and race neutral is sufficient. The inquiry is focused on whether the proffered neutral reasons are subjectively *genuine*, not on how objectively reasonable they are.' " (*People v. Hardy* (2018) 5 Cal.5th 56, 76.) The ultimate burden of persuasion regarding discriminatory motive is always on the defendant. (*Smith*, 4 Cal.5th at p. 1147; *Armstrong*, *supra*, 6 Cal.5th at p. 766.)

The court did not find a prima facie case, but invited the prosecutor to state her reasons for the challenge and the prosecutor did so. Under these circumstances, we review the correctness of the court's first stage ruling that defendant had not made out a prima case. (*Scott*, *supra*, 61 Cal.4th at p. 386; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 469–470 (*Sattiewhite*).) When the trial court has specifically found no prima facie case, a request for the prosecutor to state reasons for the challenge " 'does not convert a first-stage *Wheeler*/*Batson* case into a third-stage case.' " (*Scott*, at p. 388; *Sattiewhite*, at p. 470.) The *Scott* court observed, "an appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains

from ruling on the validity of those reasons." (*Scott*, at p. 386; *Sattiewhite*, at pp. 469–470.)

To make a prima facie case, a defendant must show " ' "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." ' " (*Armstrong*, *supra*, 6 Cal.5th at p. 766; *Johnson*, *supra*, 545 U.S. at p. 168.).) "[T]he existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made." (*Scott*, *supra*, 61 Cal.4th at p. 384.) Certain types of evidence may prove particularly relevant. "Among these are that a party has struck most or all of the members of the identified group from the venire, that a party has used a disproportionate number of strikes against the group, that the party has failed to engage these jurors in more than desultory voir dire, that the defendant is a member of the identified group, and that the victim is a member of the group to which the majority of the remaining jurors belong. [Citation.]" (*Ibid*.) At the prima facie stage, it is the defendant's burden to produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (See *Rhoades*, *supra*, 8 Cal.5th at p. 423.)

"A trial court's ruling on a *Wheeler* motion is reviewed for substantial evidence . . . . 'Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we must give "considerable deference" to the determination that appellant failed to establish a prima facie case of improper exclusion. [Citation.]' [Citation.]." (*People v. Rushing* (2011) 197 Cal.App.4th 801, 809 (*Rushing*); *People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*) [review is deferential, considering only if substantial

evidence supports court's ruling].) We rely on the trial court's contemporaneous observations of voir dire, its experience as a bench officer and its knowledge of the attorneys and of the common practices of the district attorney's office. (*People v. Smith* (2019) 32 Cal.App.5th 860, 869.)

C. *Analysis*

Defense counsel claimed that a prima facie case was shown because Juror 12 and the defendant were both Black; Juror 12 made no overtly anti-prosecution remarks; the prosecutor asked no questions of Juror 12 during voir dire; and the prosecutor's first three peremptory challenges were against people who appeared to be minorities.

The trial court acknowledged that striking the single member of a cognizable group could be due to bias against that group. It is difficult, however, to draw an inference of bias from that fact alone. " 'More is required.' " (*Wade*, *supra*, 202 F.3d at p. 1198; see also *Sattiewhite*, *supra*, 59 Cal.4th at p. 469 [prospective juror's "racial identity, standing alone, is not dispositive"]; *Bell*, *supra*, 40 Cal.4th at p. 598 ["impossible" to draw inference of discrimination solely from fact that prosecutor challenged two out of three members of cognizable group]; *Hamilton*, *supra*, 45 Cal.4th at p. 899; *Scott*, *supra*, 61 Cal.4th at pp. 384–385 [striking of three of four Black prospective jurors not sufficient for prima facie case]; *Bonilla*, *supra*, 41 Cal.4th at p. 343 [" 'As a practical matter . . . the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion' "].) The numbers here are too small to have any statistical weight. "[T]he small number of African-Americans in the jury pool makes 'the drawing of an inference of discrimination from this fact alone impossible.' [Citation.]"

(*People v. Harris* (2013) 57 Cal.4th 804, 835; see also *People v. Johnson* (2019) 8 Cal.5th 475, 508 ["in light of the small sample size, we assign no great weight to the prosecutor's excusal rate"]; *Bell*, at p. 598.) The fact that defendant and Juror 12 were both Black is also a factor to consider, but not dispositive. (*Scott*, at pp. 384-385 [striking of Black and Latino prospective jurors not dispositive even though defendant was Black and victim was White].) The fact that three of the prosecutor's challenges were of people of color did not create an inference that she challenged Juror 12 because of group bias against Black people. "No California case has ever recognized 'people of color' as a cognizable group" for purposes of a *Batson*/*Wheeler* motion. (*People v. Davis* (2009) 46 Cal.4th 539, 583; see also *Scott*, at pp. 384–385.)

Defendant contends that it was " 'particularly relevant' " that the prosecutor did not voir dire Juror 12 individually. Both attorneys used the bulk of their voir dire time asking general questions to the group designed more to preview the outlines of their arguments than to gain additional information about the jurors. Neither attorney questioned Juror 12 individually. The prosecutor asked questions of only about half of the venire. We conclude that the questioning in this case is not differentiated enough to provide any clues to discriminatory intent. There is no apparent correlation between the questions asked by the prosecutor and the peremptory challenges that she made.

Similarly, we find no inference of bias in the fact that Juror 12 said nothing indicating an anti-prosecutorial bent. Prospective jurors who appear to be fair are challenged for a multitude of reasons. Jury selection is an art, not a science, and "[a] prospective juror may be excused based upon facial expressions, gestures, hunches, and

even for arbitrary or idiosyncratic reasons." (*People v. Lenix* (2008) 44 Cal.4th 602, 613; *People v. Jones* (2017) 7 Cal.App.5th 787, 805 (*Jones*).) Reliance on the trial court's decision is beneficial, because Juror 12—and the man with a Hispanic surname—might have looked very young, which would be cause not to question Juror 12 individually. (See *Rushing*, *supra*, 197 Cal.App.4th at p. 809; *People v. Smith*, *supra*, 32 Cal.App.5th 860, 869 [we rely on the trial court's contemporaneous observations of voir dire].) If the jurors looked young, the trial court would have understood the lack of questioning of those prospective jurors. Lack of life experience is a common and permissible race-neutral reason for peremptory challenges. (*People v. Gonzales* (2008) 165 Cal.App.4th 620, 631; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328; *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1106.)

Defendant emphasizes the prosecutor's alleged "numerous inaccuracies and wild assumptions" in the prosecutor's stated reasons for the challenge. We agree with the trial court, however, that defendant did not make a prima facie case by showing an inference of discriminatory intent, and thus "the claim is resolved." (*Scott*, *supra*, 61 Cal.4th at p. 391.) We proceed to the third stage "only when *the trial court explicitly or implicitly evaluates the prosecutor's stated reasons*." (*Sattiewhite*, *supra*, 59 Cal.4th at p. 469.) As in *Sattiewhite*, "the court made its finding [of no prima facie case] *before* the prosecution's recitation of reasons." (*Ibid*.) The prosecutor's statement of reasons does not convert this case into a third-stage hearing. (*Scott*, at pp. 388–390; *Sattiewhite*, at

pp. 469–470.)

Defendant contends that the court transformed this into a third-stage case by its statement that, "[t]here has been a sufficient record made by madam prosecutor to assist the trial court in evaluating the challenge, and then it will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." The court did not assess the prosecutor's reasons or make findings of credibility or sincerity. The court did not evaluate the prosecutor's reasons either implicitly or explicitly. It clearly made its finding of no inference of discriminatory intent at the first stage, and, as in *Sattiewhite*, it did not transform this into a third-stage case. (*Sattiewhite*, *supra*, 59 Cal.4th at p. 469.)

We will review the reasons provided for a challenge when assessing a first-stage finding of no prima facie inference of discrimination, however, when the proffered reasons are discriminatory on their face. (*Scott*, *supra*, 61 Cal.4th at p. 390.) "Reviewing courts . . . . should not blind themselves to the record in the 'rare' circumstance that a prosecutor volunteers a justification that is discriminatory on its face." (*Id*. at p. 391.) A discriminatory reason is one that is based on race, ethnicity or similar grounds. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*).) " ' "[U]nless a discriminatory intent is inherent in the prosecutor's explanation," ' the reason will be deemed neutral." (*Ibid*., quoting *Purkett v. Elem* (1995) 514 U.S. 765, 768 (*Purkett*).) The court in *Sattiewhite* noted that it had never been presented with a situation in which a prosecutor had volunteered facially invalid reasons for a peremptory challenge when no prima facie case had been shown. (*Sattiewhite*, *supra*, 59 Cal.4th at p. 470, fn. 5.)

A race-neutral explanation need not be persuasive or even plausible. The persuasiveness of the reasons given is relevant only if the challenging party made a prima facie case of purposeful discrimination. (*Purkett, supra*, 514 U.S. at pp. 767–768.) "[A] peremptory challenge may be based on 'no more than a "hunch" about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias.' " (*Jones, supra*, 7 Cal.App.5th at p. 805, quoting *People v. Williams* (1997) 16 Cal.4th 635, 664; see also *Scott, supra*, 61 Cal.4th at p. 687.)

The prosecutor's comments were not based on ethnicity or race and thus were not discriminatory on their face. (*Gutierrez, supra*, 2 Cal.5th at p. 1158; *Purkett, supra*, 514 U.S. at p. 768.) Defendant points to the prosecutor's explanation that Juror 12's "flagrant comment about silly things kids do cause[d] some concern." Neither that statement, nor any other reason stated by the prosecutor, were based on ethnicity or race and thus were not inherently discriminatory. Defendant contends that the prosecutor's reasons show that she had discriminatory intent because of the "numerous inaccuracies and wild assumptions" made by the prosecutor. Defendant criticizes the prosecutor for saying that Juror 12 was very young without evidence of his age. Age is usually estimated by a person's features. The prosecutor did not have to ask Juror 12 to know if he were young, and, as noted, the court also had the opportunity of viewing Juror 12. The prosecutor assumed that the defendant lived with his mother or grandmother. In answering the court's standard questions, Juror 12 talked about his grandmother's occupation. It is not clear if he discussed this in response to the general question about employment of other

adults in the household or in response to the question about acquaintances in law enforcement. The prosecutor may have assumed that Juror 12 lived with his grandmother because of his discussion of her employment. That assumption may be correct or incorrect, but it is not based on race or ethnicity. (See *Jones*, *supra*, 7 Cal.App.5th at p. 805 [peremptory challenge may be based on a hunch, if it is not based on group bias].) Defendant also criticizes the prosecutor's concern about Juror 12's "flagrant comment about silly things kids do", because Juror 12's grandmother might have worked with dependent children at the Polinsky Center rather than with delinquent children at juvenile court. This assertion is speculative. Juror 12 said that his grandmother "worked for the juvenile court out of Kearney Mesa maybe." It was a reasonable assumption that his grandmother worked with delinquent children at juvenile court and, in any event, this reason is race-neutral. This is not the rare case where the reasons proffered were discriminatory on their face. (*Scott*, *supra*, 61 Cal.4th at p. 391; *Gutierrez*, *supra*, 2 Cal.5th at p. 1158.)

Viewing the totality of the record, sufficient evidence supports the trial court's determination that there was no inference of discrimination. (*Armstrong*, *supra*, 6 Cal.5th at p. 766.) The record does not support an inference of group bias against Black people. (*Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at p. 276.) Defendant has not met his burden of demonstrating an inference of such discrimination by the prosecutor. (*Armstrong*, at p. 766.)

2. Prosecutorial Error

Defendant contends the prosecutor committed prejudicial error during closing argument by trivializing and disparaging defendant's right to a trial by jury, and that the trial court's admonishment to the jury of the burden of proof beyond a reasonable doubt made the error worse. We disagree, as we explain.

A. *Trial Court Proceedings*

In her initial closing argument, the prosecutor discussed the plethora of evidence against defendant—his fingerprints, eyewitness identifications, surveillance video, photographs, distinctive tattoos, and his confession to the crimes. The prosecutor discussed the elements that had to be proven and said that identification of the robber was the only issue before the jury. She then asked rhetorically:

> "Now, some of you may ask, you know, why are we here? It is so obvious. People have ID'd him. He is there on the video. He is there on pictures. He admitted. Why are we even having a trial?"

She answered her question: "Well, the law says everybody has a right to a jury trial." Defendant objected. The court said the prosecutor's statements did not shift the burden of proof, and overruled the objection. It then admonished the jury: "[T]he People must prove the defendant guilty beyond a reasonable doubt. That burden is solely on the People. Defense has no burden whatsoever. They do not have to prove that the defendant is not guilty of the charges."

The prosecutor continued: "And I will ask you to hold me to that [burden]. [¶] Everybody has a right to a trial." She gave an example of a crime being committed in the

courtroom in front of everyone assembled, and said that person would still be entitled to a trial. "That's the way our judicial system works and it is fair. That person is entitled to . . . a fair trial. [¶] And [defendant] has received a fair trial. He will continue to receive it from you."

Later, outside the presence of the jury, the court admonished the prosecutor to avoid discussing the defendant's constitutional rights during closing argument.

B. *Legal Principles*

Under California law, to establish prejudicial prosecutorial error a defendant must show that the prosecutor used " 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted." (*People v. Riggs* (2008) 44 Cal.4th 248, 298 (*Riggs*).) Moreover, a prosecutor's error violates the federal Constitution if his or her comments " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

"A claim of prosecutorial misconduct may have merit even absent proof that a prosecutor had 'a culpable state of mind.' [Citation.] For this reason, '[a] more apt description of the transgression is prosecutorial error.' [Citation.] . . . For such remarks to constitute error, however, it is not enough that the remarks could be construed as improper. [Citation.] Instead, '[a] defendant asserting prosecutorial misconduct must . . . establish a reasonable likelihood the jury construed the remarks in an

objectionable fashion.' [Citations.]" (*People v. Potts* (2019) 6 Cal.5th 1012, 1036 (*Potts*).)

In conducting this inquiry, we " ' "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Brown* (2003) 31 Cal.4th 518, 553–554.) Moreover, we do not look at isolated words or phrases, but instead "view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

C. *Analysis*

Statements similar to the prosecutor's comments were found not to be error in *People v. Perez* (2017) 18 Cal.App.5th 598 (*Perez*). The prosecutor there argued, "Because the way our justice system works is this. When you're accused of a crime, no matter how guilty you know you are, you have the right in our country to have 12 citizens . . . sit through a boring trial and hear the evidence. No matter how guilty you know you are. Every person in this country has that right. And you've given him that right. You've done that." (*Id*. at p. 623.) The appellate court concluded that this argument was neither deceptive nor reprehensible because it did not "denigrate the presumption of innocence and no reasonable juror was likely to construe the argument in the manner defendant suggests." (*Id*. at p. 624.)

We agree and conclude the same here. The prosecutor's argument in no way suggested that defendant should not have a trial and it did not lower the prosecution's burden of proof. In *People v. Redd* (2010) 48 Cal.4th 691, the prosecutor repeatedly implied there was no defense to the charges, comparing the defense to a blank piece of

paper. (*Id*. at p. 739.) The court rejected a claim that these remarks shifted the burden of proof to the defendant, stating "the prosecutor's comments merely highlighted his observation that there seemed to be no coherent defense to the charges." (*Id*. at p. 740.) Similarly here, the prosecutor highlighted the abundance of evidence: eyewitness accounts and identification of defendant, physical evidence of fingerprints, photographs and video, and a confession. She was commenting on the strength of the evidence against defendant, and explaining his right to a trial no matter how strong the evidence appeared to be. A prosecutor can make " 'fair comment on the evidence' " during closing argument. (*People v. Edwards* (2013) 57 Cal.4th 658, 736; *People v. Weaver* (2012) 53 Cal.4th 1056, 1077 [prosecutor generally may comment on state of the evidence at closing argument].) The prosecutor's comments did not denigrate the right to a fair trial, did not deny defendant his right to due process, and were neither deceptive nor reprehensible. (*Perez, supra*, 18 Cal.App.5th at p. 623.)

Defendant argues that the prosecutor's emphasis on the defendant's right to a fair trial was actually " 'suggesting exactly the opposite' " of what the prosecutor said. (*People v. Wrest* (1992) 3 Cal.4th 1088.) In *Wrest*, the prosecutor told the jury there was not enough time to argue all the things he wanted to argue, then listed the points he was not arguing, some of which were improper argument. He identified contentions and tried to avoid accountability for the arguments. The Supreme Court described the rhetorical strategy of paralipsis, suggesting the opposite, with the example of, "I am not arguing X," and then listing all the Xs. The court explained that the prosecutor was in fact asserting

the validity and relevance of X, but, for lack of time, was concentrating on other, presumably more important topics. (*Id*. at pp. 1106–1107.)

That is not what the prosecutor did here. She did not list things that she was not arguing. She did not state or imply that defendant was not entitled to a trial. Instead, she emphasized the importance of a fair trial, even when the evidence seems to be overwhelming. We find no support for defendant's argument that, "the prosecutor ostensibly verbalized support for [defendant's] exercise of his right to a trial by jury . . . in a patently deceptive manner that clearly conveyed to the jury that the prosecutor's personal opinion was that a trial was wholly unnecessary." The prosecutor did not engage in paralipsis. She did not suggest omission of the right to a fair trial by a minimal statement of it. Defendant points to nothing in the record supporting his allegation, nor to any evidence that the jury understood the argument in this objectionable fashion, much less that the jury applied the argument by failing to deliberate on the charges. (*Potts, supra*, 6 Cal.5th at p. 1036.)

Defendant also contends that the prosecutor was improperly vouching for the strength of the evidence by her description of a hypothetical crime that occurred in front of the jury. " 'Impermissible "vouching" may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.' " (*People v. Williams* (1997) 16 Cal.4th 153, 257.) The prosecutor's description of a hypothetical crime that occurred in the courtroom neither placed the

prestige of the government behind the trial evidence nor suggested she had information not given to the jury. There was no vouching.

Further, the prosecutor's hypothetical about the right to a jury was not comparable to the hypothetical that was found objectionable in *People v. Centeno* (2014) 60 Cal.4th 659, 670 (*Centeno*).) There, in discussing reasonable doubt, the prosecutor used an outline of California with some pieces missing and invited the jury to view the evidence overall as it would view the iconic image of its state. (*Ibid*.) The court found it "misleading to analogize the jury's task to solving a picture puzzle depicting an actual and familiar object unrelated to the evidence." (*Ibid*.) Here, the prosecutor used the hypothetical to emphasize a defendant's right to a fair trial even if the crime had occurred in front of the jury itself. The prosecutor was reiterating the defendant's right to a fair trial and the prosecution's burden of proof, no matter how strong the evidence was.

Moreover, the court immediately reminded the jury that the People had the sole burden to prove the defendant guilty beyond a reasonable doubt, and the defendant had no burden at all. We presume that the jury followed the instructions of the court and disregarded any comments by the prosecutor that conflicted with those instructions. (*Centeno*, *supra*, 60 Cal.4th at p. 676.) Defendant claims that instead of ameliorating any harm from the prosecutor's argument, the court exacerbated harm by putting its imprimatur on the prosecutor's alleged trivializing of the right to jury. We cannot conclude that the court's statement of the burden of proof and the prosecution's duty to satisfy it was interpreted by the jury in any way injurious to defendant. The jury gave due consideration to defendant, deliberating for more than a full day. It did not interpret

the prosecutor's remarks as a direction not to deliberate on the charges, and it did not find all charges true based on the prosecutor's or the court's remarks. Importantly, the jury could not unanimously find defendant guilty on counts 2 and 3, indicating that the prosecutor's closing argument did not trivialize or make a mockery of the trial. The jury carefully separated out the robberies and could not agree beyond a reasonable doubt that defendant was the one who robbed the U.S. Bank on October 17. The jury held the People to their proper burden and gave defendant a fair trial.

Any possible error, in any event, was harmless beyond a reasonable doubt. The evidence was, as the prosecutor argued, overwhelming. Fingerprints, identifications, photographs and video all identified defendant as the robber. He used similar language and method of operation during the robberies, asking for "100's" or large bills. To cap it off, he admitted the robberies to the police.

We conclude that no error occurred. We do not condone the prosecutor's remarks and find them unnecessary at best. We caution prosecutors to stay away from any discussion of rights that could be misconstrued. Nevertheless, we conclude that the prosecutor did not deprive defendant of a fair trial, and her remarks were neither deceptive nor reprehensible. We cannot find any likelihood that the jury construed the prosecutor's remarks as stating that the trial was an unnecessary waste of time. (*Potts*, *supra*, 6 Cal.5th at p. 1036.)

3. *Remand for Resentencing*

Defendant requests, and the People agree, that this case should be returned for the trial court to exercise its discretion in determining whether to impose the five-year enhancements for having a prior serious felony conviction (§ 667, subd. (a)). We agree and accept the People's concession. The five-year enhancements were mandatory when the court sentenced defendant in 2018. (Former § 1385, subd. (b).) The Legislature changed the law, effective January 1, 2019, to make imposition of that term discretionary. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973.) This new rule is applicable to all cases not yet final on appeal. (*Id*. at p. 973; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) This case is not final on appeal so the defendant obtains the benefit of the new rule.

The record does not indicate if the court would have stricken or imposed the enhancement had it been discretionary at the time of sentencing. (See *People v. Jones* (2019) 32 Cal.App.5th 267, 273 [remand not necessary if clear from the record that court would not have stricken enhancement].) We will remand for the trial court to exercise its discretion.

DISPOSITION

The case is remanded with direction to the court to exercise its discretion under section 1385, subdivision (b)(1) with respect to defendant's prior serious felony convictions, and the judgment is affirmed in all other respects.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.